

In the Matter of Merchant Mariner's Document No. Z-448950
Issued to: ELINO ARNERO BALICHE, Chief Steward

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

608

ELINO ARNERO BALICHE, Chief Steward
In the Matter of

Merchant Mariner's Document No. Z-448950
Issued to: ELINO ARNERO BALICHE, Chief Steward

Merchant Mariner's Document No. Z-24795
Issued to: FRANCIS J. BUTTZ, Assistant Cook

Merchant Mariner's Document No. Z-757850
Issued to: KING DING, Chief Cook

Merchant Mariner's Document No. Z-382682
Issued to: GORDON GERALD ERICKSON, Utility Messman

Merchant Mariner's Document No. Z-504726
Issued to: WONG FU, Messman

Merchant Mariner's Document No. Z-809556
Issued to: ALBERT MILTON GAINES, Utility Messman

Merchant Mariner's Document No. Z-193061-D2
Issued to: JAMES ALPHONSO GREER, Utility Messman

Merchant Mariner's Document No. Z-595317
Issued to: THEODORE MACRIDES, Utility Messman and Steward's Department delegate

The above eight Appellants have taken this appeal in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

On 18 June, 1952, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellants' respective Merchant Mariner's Documents upon finding each of them guilty of misconduct based upon three specifications alleging that while serving in the above indicated capacities in the Stewards Department on board the American SS ALASKA BEAR and while acting under authority of the documents above described, they did:

1. ". . . on or about 5, 6 and 7 December, 1951, unlawfully and without sufficient justification fail to perform your duties aboard said vessel.
2. ". . . on or about 8, 9 and 10 December, 1951, unlawfully and without sufficient justification fail and refuse to perform your duties aboard said vessel.
3. ". . . on or about 8, 9 and 10 December, 1951, unlawfully and without sufficient justification fail and refuse to perform your duties aboard said vessel in combination and conspiracy with other members of the Stewards Department."

At the hearing, the eight Appellants were jointly represented by the same counsel of their own choice. Upon motion by the Investigating Officer and without objection, the cases were consolidated for the purpose of the hearing. Counsel waived the reading of the preliminary instructions as well as the charge and specifications; and he entered a plea of "not guilty" to the charge and each specification for every one of the eight Appellants. In lieu of the production of documents by Appellants, it was stipulated that each of them held the appropriate above named Merchant Mariner's Document.

Counsel then made a motion for a continuance in order to permit preparation of the defense and to await the return of two proposed witnesses for the Appellants. The motion was granted for the former reason but denied as to the latter until later in the hearing. The two seamen desired as witnesses appeared and testified before the close of the hearing.

The Investigating Officer introduced in evidence the testimony of the Master, Chief Mate and Junior Third Mate; and excerpts from the Shipping Articles of the ALASKA BEAR for the period in question. During the course of the introduction of evidence by the Investigating Officer, the Examiner placed in evidence the Official Log Book of the ALASKA BEAR and two Consular Reports concerning incidents which occurred on the voyage that extended over the dates contained in the three specifications.

After the Investigating Officer had rested his case-in-chief, counsel made a motion to dismiss on the ground that the Appellants' conduct was justified. After argument, the Examiner ruled that a prima facie case had been made out and he denied the motion.

Thereupon, all except two of the Appellants testified under oath and numerous documents

were offered in evidence as defense exhibits. Counsel then rested his case-in-chief.

Several rebuttal witnesses were then called by the Investigating Officer and counsel. The five Deck Department seamen (Giblin, Reed, Owens, Ruff and Gates), whose conduct Appellants claim led to their failure to work, appeared as witnesses for the Investigating Officer. Counsel then submitted the testimony of one additional Appellant and three members of the crew (Smith, Hanrahan and Humphreys), each of whom claims to have been unjustifiably attacked and beaten by a different one of the above five seamen during the course of the voyage.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellants' counsel and given both parties more than the time requested in which to submit proposed findings and conclusions, the Examiner rendered his decision in which he concluded that the charge had been proven by proof of the three specifications as to each of the eight Appellants. The Examiner then entered identical orders suspending Appellants' Merchant Mariner's Documents for a period of six months from the date the documents are deposited with the United States Coast Guard. It was further ordered that the last three months of this suspension shall not become effective provided no charges are proved against Appellants' respective documents under R. S. 4450, as amended, for acts committed within one year from the date of the deposit of the documents; and that the documents be forthwith deposited with the Coast Guard.

This appeal from that order has been taken on behalf of each of the eight Appellants. It is urged that the order imposed is not warranted by the findings or the "judgment"; and that the "judgment" is not supported by any of the evidence or findings. It is contended that the findings of the Examiner and the evidence show that: the Master was unable to control the activities of the five members of the deck department who were responsible for the reign of terror on board this vessel and in every port the ship visited; Appellants were in fear of their lives and of great personal injury by virtue of the conduct of these five seamen who had brutally assaulted two members of the Stewards Department (Smith and Hanrahan) and the radio operator (Humphreys) as well as threatening to throw the Second Mate over the side and causing the Chief Engineer and one of his assistants to seek permission to leave the vessel because they were in fear of the five seamen; and Appellants refused to work with these five seamen aboard the vessel. For these reasons and also because Appellants used no threats or violence but only requested protection which the Master did not give, it is submitted that the facts warrant nothing more than a severe reprimand; and that this is a mild case compared to the PRESIDENT WILSON case (Headquarters Appeal No. 435) in which the outright suspensions were remitted by the Coast Guard despite the use of physical violence upon members of the Stewards Department by members of the Deck Department who had been found guilty of failing to, and conspiring not to, turn to and sail the vessel until three certain members of the Stewards Department left the ship.

APPEARANCES: Messrs. Gladstein, Andersen and Leonard of San Francisco by George R. Andersen, Esquire, of Counsel.

FINDINGS OF FACT

Appellants signed the Shipping Articles, dated 2 October, 1951, of the American SS ALASKA BEAR, Official Number 246004, and thereby contracted with the Master to sail on a foreign voyage to one or more ports in Arabia, such other ports as directed by the Master, D. E. Noble, and back to a final port of discharge on the Pacific Coast of the United States, for a period of time not to exceed nine months. The Appellants served under the authority of their Merchant Mariner's Documents in their respective capacities from the time the ALASKA BEAR left the United States until she returned to San Francisco, California, on 19 January, 1952.

After departing from San Francisco, on 4 October, 1951, the sailing dates of the ALASKA BEAR were as follows: 15 October, Portland, Oregon; 30 October, Yokohama, Japan; 28 November, Damman, Saudi Arabia; 29 November, Ras Tanura, Saudi Arabia; 8 December, Karachi, Pakistan; 11 December, Cochin, India; 13 December, Colombo, Ceylon; 19 December, Penang, Malaya; 21 December, Port Swettenham, Malaya; 24 December, Singapore; 28 December, Hong Kong; 5 January, 1952, Kobe, Japan; and 7 January, Yokohama, Japan.

On the same day or the day before the ship sailed from San Francisco on 4 October, 1951, a member of the Engine Department, Pedro Suazo, was found lying in an unconscious condition in a passageway of the ship. His face was injured but it was not established whether this resulted from a fall or a beating. Suazo had lost or been robbed of approximately \$300 but he had been so inebriated that he knew neither which of the two had happened nor how his injuries had occurred. He remained on board for the entire voyage.

On the night of 30 October, 1951, eight members of the Deck Department delayed the ship's departure from Yokohama for four hours when they were arrested and questioned in connection with a general disturbance and destruction of a bar in Yokohama. None of the seamen were identified by the owner of the bar and they were released. All of them returned to the ship with the exception of Higgins who had been injured. He remained ashore for hospitalization.

Five of the men arrested were Thomas E. Giblin, Daniel R. Reed, Thomas Owens, Jr., Gottfried Ruff and Jack W. Gates. They later acquired the reputation, among the members of the Stewards Department and some other members of the crew, of being overly eager and competent physical combatants. Because of this reputation and since they usually banded together both ashore and afloat, these five seamen were known to some of the members of the crew as the "Filthy Five."

On 16 November, 1951, while the ALASKA BEAR was in the port of Damman, Saudi Arabia, there was a fight between John L. Smith (a member of the Stewards Department and the crew messman) and Daniel R. Reed (Deck Department delegate) while Smith was serving the noonday meal. The dispute arose as a result of previous complaints about Smith's unsatisfactory service and unsanitary habits concerning which the Master had twice reprimanded Smith. One blow was struck by each man and Smith received a cut over one eye before he ran into the galley and picked up a meat cleaver. But he was disarmed by William Hanrahan, the Second Cook, and the Second Mate then entered and prevented any further disturbance. Both men were taken to the Master's cabin but no disciplinary action was taken. First aid was administered to Smith by the Purser. Reed was not injured. Smith weighed about 200 pounds and Reed's weight was

approximately 185.

Shortly after the fight, the members of the Stewards Department held a meeting. After the meeting, the Master sent for the delegate of the Stewards Department, Macrides, in order to replace Smith as the crew messman. Erickson was with Macrides and when the former stated that he would be willing to change jobs with Smith, the Master assigned Erickson to the duties of crew messman. At this time, Macrides told the Master that the lives of the members of the Stewards Department were in danger and that if someone else was hit, they might refuse to continue to sail.

On about 25 November, 1951, while the ship was still at Damman, Reed was operating the controls of a winch when he pushed away a native Coast Guardsman because the guard was interfering with the handling of a boom by means of the winch. The guard filed a complaint and the Master was required to arrange for an apology to the guard.

The ALASKA BEAR arrived Karachi, Pakistan on 1 December, 1951, and there was an unusual amount of drinking by the members of the crew while the ship was in that port. On 3 December, 1951, Giblin and one or more of his shipmates engaged in a fight in the Seamen's Club and considerable damage was caused. The hotel manager complained to the Master but no further action was taken.

On 4 December, 1951, Giblin and Hanrahan engaged in a fight on board the ship. These two members of the Deck and Stewards Departments, respectively, were evenly matched, in weight, at approximately 200 pounds. In the morning, Hanrahan had been drinking to such an extent that he could not properly perform his duties. He was taken before the Master by the Chief Steward in order to make him promise not to drink while working. Later, while Hanrahan was drinking with Giblin, Reed and Davis in their forecabin, Hanrahan challenged Giblin to fight but the Chief Mate forced Hanrahan to leave the room and told him that he would be put in irons if he did not stay in his own quarters. Hanrahan slept most of the afternoon and did not leave his quarters until about 2000 that evening. When he went out into the passageway, Giblin called to him and the encounter took place at that time. Hanrahan's face was badly cut and bruised and his arms were bruised. After being hospitalized for three days, he was released as fit for duty. He was readmitted for possible head injuries when he complained of severe headaches but an X-ray examination disclosed no head injuries and Hanrahan was released to be repatriated to the United States. Since there were no eye witnesses to this incident, it was never positively established that Giblin was the aggressor or even participated in this fight. Consequently, no disciplinary action was taken against him by the Master. After Hanrahan's removal from the ship, there were nine persons remaining in the Stewards Department.

At about 2030, the Stewards Department delegate told the Master that the members of his department would not sail and were going ashore as long as Giblin, Reed, Owens, Ruff and Gates remained on board. At the same time, the Chief Engineer expressed his fear of these five seamen and stated that he would not sail with them; but he completed the voyage without further complaint insofar as the record discloses.

Since the ship was scheduled to get underway at 2400 on 4 December and a sailing notice to this effect had been posted on the board at the gangway, the Master went ashore at 2100 and saw Vice Consul Hughes at the American Embassy in order to obtain his assistance in moving the ship. No one from the ship was with the Master but the ship's agent accompanied him. The Master informed the Vice Consul that there had been a fight and that the members of the Stewards Department probably would not sail unless the five specified members of the Deck Department were removed. Since the Vice Consul decided that an investigation would be made, the vessel was not able to sail as scheduled.

As a direct result of this second fight, Macrides called a meeting of the Stewards Department at 2230 the same night. It was unanimously decided that after two fights they would go to the Consul and protest and get off the ship before someone was killed. The meeting was adjourned at 2330 and the Master was advised by the delegate, in the presence of all the members of the Stewards Department, of their decision to go ashore. This occurred at about 0200 on 5 December when the Master returned to the vessel; and by 0300, all eight of the Appellants and Smith had departed from the ship. None of the Appellants performed any of their assigned duties on board the vessel from this time until the afternoon of 10 December, 1951.

After the decision of the Stewards Department was made known to the Master, he asked the delegate of the Engine Department to hold a meeting for the purpose of ascertaining whether any of the unlicensed personnel in that department intended to refuse to sail. After the meeting, the delegate reported to the Master that they were all ready and willing to sail the ship at any time. Throughout the trip, the Master did not receive one complaint from the unlicensed personnel of the Engine Department concerning the actions of any member or members of the Deck Department.

At 0820 on 5 December, 1951, American Vice Consul Miller boarded the ALASKA BEAR, took possession of the ship's official papers and announced that a Consular investigation would be conducted. On 5 December and on 6 December until 2200 that night, sworn testimony was taken from the crew members by the Vice Consul in order to determine whether the five Deck Department members should be discharged on the ground of misconduct. Practically all of the nine members of the Stewards Department testified but none of them mentioned the incident in San Francisco before departure. Except when testifying, the members of the Stewards Department remained ashore. Testimony from several of the ship's officers and some of the Deck Department was received. But the five seamen whose conduct was being investigated and other members of the Deck Department declined to testify themselves in favor of the testimony given by their delegate Reed who acted as their spokesman. Hanrahan was still in the hospital and did not appear to testify.

On the morning of 7 December, 1951, the Master induced the members of the Stewards Department to return on board the ship by leading them to believe that he would remove three of the five men, thus leaving a minimum working crew of nine unlicensed seamen in the Deck Department. Another Stewards Department meeting was held between 0930 and 1030 that morning at which this proposition was unanimously agreed to and all the members of the Stewards Department returned to the ship.

At about 1600 on 7 December, 1951, the Master was summoned to the American Embassy where he was informed by the Consul General that the evidence produced at the investigation was not sufficient to warrant "the discharge of any of the members of the Deck Department for misconduct . . ." (Consular Report from Karachi, Pakistan, dated 15 January, 1952). The ship's official papers were then returned to the Master and he was told to sail his ship with all the present crew on board. This decision was not given to the Master in writing and it was given verbally only to himself and the ship's agent who again had accompanied him to the American Embassy. No further action was taken by the Consul General at Karachi until the above written report was made to the Department of State.

The Master and ship's agent obtained clearance for the ship and arranged with the Karachi Harbor Police to prevent anyone from leaving the ship. He then returned on board at 1800, cancelled all shore leave, and informed the Stewards Department delegate of the Consul's decision. The sailing notice was posted for 2400 on 7 December and the Master ordered the crew to turn to. The members of the Stewards Department wanted to get off the ship and call on the American Consul to protest his decision. When the Master refused to permit them to leave the ship, they refused to turn to. The ship got underway as scheduled with all hands on board except Hanrahan.

On the morning of 8 December, 1951, the Master ordered the members of the Stewards Department, individually, to turn to. They all refused, stating that they were in fear of physical injury. The men were then logged and confined to their quarters on bread and water. This procedure was repeated on the following morning with the same results except for Smith who was put to work in the galley after he stated that he was willing to turn to. The Master was too busy on the morning of 10 December to call the men up before him but they still refused to work and remained confined to quarters on bread and water.

The AKASKA BEAR arrived at Cochin, India, at approximately 1300 on 10 December, 1951. There had been no evidence of drinking on board since departure from Karachi. After obtaining the Master's permission, Appellants held a meeting at about 1600 on 10 December in order to decide whether they would go back to work under the existing conditions. By a vote of five to two, with one man abstaining from voting, it was agreed that they would return to their duties rather than wait until they received a reply, from their union, to the message which delegate Macrides had sent on 8 December outlining the situation and asking for instructions. Shortly after appearing before the Master and telling him of their decision, Appellants commenced performing their assigned duties again and continued to do so until the completion of the voyage.

On 12 December, 1951, while the ALASKA BEAR was in the port of Colombo, Ceylon, there was an exchange of blows between Norvel C. Humphreys, Radio Operator on the ALASKA BEAR, and Thomas Owens, Jr., in a local hotel bar. There is no evidence that Owens was hurt but Humphreys received face injuries which included a broken jaw and damage to both eyes. The incident was investigated by the local police and the American Consul on the same night but no action was taken by them or by the Master. Humphreys continued on the voyage as far as Singapore where he was hospitalized sometime after the ship arrived there on 22 December, 1951. On 27 December, Humphreys reported to the American consulate General at Singapore and awaited

repatriation from that port.

After the ALASKA BEAR departed from Colombo, her next port of call was Penang, Malaya, where the crew caused such disturbances ashore that the ship's agent informed the Singapore agent to be on the alert when the ship arrived. There is no evidence of specific incidents or the persons involved in any disturbances at Penang; and the ship left there on 19 December.

At some time on 24 December, 1951, before 0200, while the ship was at Singapore, Giblin and Ruff were returning to the ship when they were stopped by the local police at the gate leading to the dock area and asked to show their passes. Giblin grabbed a police officer and struck him instead of producing the pass. They were arrested and held in custody by the police. The next morning Giblin was charged with committing an unprovoked attack upon a police officer who was performing his duty by requesting Giblin to display his harbor pass. Giblin entered a plea of guilty and was sentenced to pay a fine of \$275 Malayan money (\$90.41 United States currency at the exchange rate current at that time) or spend six months in jail. The fine was paid by taking up a collection among the members of the Deck Department and Giblin was released. Ruff was released without having been charged with any offense. The ship sailed that same evening bound for Hong Kong.

Messman John L. Smith failed to join the ship at Singapore and on 26 December, 1951, he reported to the American Consulate General at Singapore to await repatriation. Smith had also failed to join the ship at Port Swettenham, Malaya, on 21 December but had obtained transportation to rejoin the ship at Singapore. At the hearing, Smith testified very definitely that he did not miss the ship through fear of any of the crew and that he intended to "bring it back to the States" but had "missed the ship there" (R. 665).

On 27 December, 1951, the American Consulate General at Singapore received a total of three complaints about the behavior of the crew of the ALASKA BEAR before she had left that port. A fireman from another ship claimed to have been beaten by one of the crew. The managements of two hotels stated that the seamen had created disturbances and used foul and obscene language. This information was received at the American Embassy three days after the ALASKA BEAR had departed.

A few hours before departure from Hong Kong on 28 December, 1951, a Chinese woman who was on the ship was molested to an undetermined extent by Giblin and another member of the Deck Department.

There is no evidence of any unfavorable incidents occurring at a later date aboard the ship or at the two remaining ports of Kobe and Yokohama, Japan, which the ALASKA BEAR visited before returning to San Francisco on 19 January, 1952.

The consistent theme of Appellants was that they were in fear of their lives or serious physical injury because of the presence of Giblin, Reed, Owens, Ruff and Gates. The Appellants plan to refuse work was carried out without verbal threats or violence.

The Master did not take disciplinary action against any of these seamen for their conduct on board or ashore. The Master did not think that it was his duty to discipline the crew for events which happened ashore and did not affect the safety of the ship. These five men were all more competent than the average seaman in performing their duties and they were good workers.

The evidence indicates that, at times, there was drinking aboard the ALASKA BEAR while she was underway and that a considerable amount of intoxicants were consumed on board when in port.

From the point of view of violence on board the ship, the Master and the Chief Mate testified that they considered the voyage to have been an average or normal one since there were only two incidents of violence on board during a voyage extending over a period of more than three and a half months.

There is no record of prior disciplinary action having been taken against any of the Appellants.

OPINION

Although my findings of fact do not differ from those of the Examiner on any material points and Appellants have not taken exception to the Examiner's findings, I would like to mention that there is such a considerable amount of inconsistent, conflicting and self-contradictory testimony in the record as to make it obvious that some of the testimony is highly incredible. A good example of this is the testimony of several members of the Stewards Department that they saw Pedro Suazo beaten and robbed by some of the men in the Deck Department with whom they objected to sailing. For this reason, some of the accusations and alleged threats testified to have not been included in my findings of fact because they do not constitute substantial and reliable evidence.

Appellants contend, in effect, that the findings of the Examiner do not support his conclusions and, in turn, the conclusions that the specifications were proved does not justify the order of suspension imposed by the Examiner.

As to whether the findings support the specifications, Appellants claim that they were justified in their conduct because the Master had no control over the five members of the Deck Department and, consequently, Appellants were in fear of their lives and of great physical injury as a result of the conduct of these five seamen.

A recapitulation of the above events which took place on the voyage shows that out of the total of twelve incidents including the three reported to the American Embassy at Singapore after the ship had left that port, one or more of the five men were definitely identified as being involved in eight of these events. But only three of these incidents might reasonably arouse any degree of apprehension of serious personal injury. They are the fight between Giblin and Hanrahan on 4 December; the fight between Owens and Humphreys on 12 December; and the striking of the

policeman by Giblin on 24 December. The fight between Smith and Reed was not a serious one. They both testified that only one blow was struck by each man and the only disagreement, in this respect, is which man swung first (R. 422, 657-8). Appellants themselves excluded the Suazo (3 or 4 October) and Higgins (30 October) incidents as causes for their fear by referring to only two fights (Smith and Hanrahan) in their meeting on 4 December and in the telegram sent to their union on 8 December, and by not mentioning the Suazo incident at the Consular investigation. Only one of the three serious events occurred on the ship and was a matter which involved a Stewards Department member and one of the five members of the Deck Department for whom Appellants proclaim they had great fear. And this was the only one of the three incidents which took place prior to the Consular investigation.

In considering whether Appellants were justified in leaving the ship and not performing their duties on 5, 6 and 7 December, 1951, between the time of the Giblin-Hanrahan fight and when the decision of the Consul was made known to them, it must be borne in mind that Appellants were contractually bound by the Shipping Articles, which they had all signed, "to stand by the ship and obey the master until the voyage be done, unless she come to such a pass as to be dangerous to human life (citing cases)." The Condor (D.C.N.Y., 1912), 196 Fed. 71. Thus, the burden is placed upon Appellants to justify their admitted breach of the articles; and it is difficult to conceive that their lives were in danger while the ship was in port and a Vice Consul on board conducting an investigation. Therefore, the conclusion that this specification was proved will be upheld unless the conclusion is also to be reached that the ship was inherently unseaworthy, at this time, because of the conduct of the members of the Deck Department; or that Appellants had good and sufficient reason to believe that she was unseaworthy. For the reasons discussed, *infra*, I do not think that this was the condition of the ship.

The next two specifications pertain to Appellants failure and refusal to work on 8, 9 and 10 December, 1951, and their combining and conspiring to do so. Assuming proof of unjustified failure and refusal to perform their duties, the proposition of conspiracy is readily disposed of on the basis of the admission by counsel in his argument (R. 734), the unity of design and purpose of Appellants as shown by their unanimous decision to get off the ship, and the admitted course of conduct which they followed. The determination as to the point which was assumed above depends upon whether the Consul's decision can be said not to have been correct at the time it was made; whether the ship was inherently unseaworthy on the basis of the conduct of these five Deck Department seamen; and whether, if both of these are answered in the negative, Appellants had reasonable cause to fear that their lives were in danger or that they were in danger of suffering grave bodily harm.

Under Title 46 United States Code 682, a Master may request a Consul to discharge a seaman or a seaman may make application to the Consul for his own discharge. The investigation in this case resulted from the Master's request that the Consul render his assistance in moving the ship. If a Master discharges a seaman in a foreign port without having first obtained the consent of a Consul, the burden is on the Master to justify the discharge. The Golden Sun (D.C.Calif., 1939), 30 Fed. Supp. 354. But when the Consul has acted, then his decision is *prima facie* correct and it must be followed unless persuasive evidence to the contrary is presented by the person who seeks

to go behind the Consul's decision. The T. F. Oakes (C.C.Ore., 1888), 36 Fed. 442; The Golden Sun, supra; McAvey v. Emergency Fleet Corp. (D.C.Mass., 1926), 15 F.2d 405.

Obviously, the decision of the Consul, that there were not sufficient grounds to discharge any of the Deck Department members, was based on the events which occurred up to the time of the investigation and which he was told about. The Vice Consul conducted a thorough investigation and took testimony mostly from the Appellants. Nevertheless, he decided that the entire crew should stay on board. On the basis of the evidence in the record before me, it would be unreasonable to state that the decision of the Consul was not right.

The only serious act of violence on board had been the fight between Giblin and Hanrahan. The latter had been extremely inebriated earlier in the day of the fight and had challenged Giblin to a fight. Hence, it is not possible to say that this was an unprovoked attack upon a member of the Stewards Department. In addition, there were no eye witnesses as to how the fight started and Hanrahan could not have been brutally beaten because he was released from the hospital as fit for duty in three days.

In the case of Smith's fight with Reed, it is reasonable to assume that there was at least some provocation by Smith who had been reprimanded twice by the Master because of his poor performance as crew messman.

It is also noted that in neither of these fights nor in any subsequent ones is there substantial evidence to show that any of these five men were assisted by one or more of the other four while engaged in single combat.

There is concrete evidence that Erickson and Hanrahan were not fearful of these five men at the time of the Smith fight or later. Hanrahan disarmed Smith of the meat cleaver instead of picking up one himself as would have been the instinctive thing to do if he thought he was protecting his life. On the day of his fight with Giblin, Hanrahan had been drinking with Giblin, Reed, and Davis in their forecabin and then Hanrahan had to be forced out of the room after threatening Giblin. As for Erickson, he voluntarily took over Smith's job as crew messman right after the fight. And at the meeting on 10 December, he voted to go back to work.

The Master received no complaints from the Engine Department about the members in the Deck Department and the Engine Department members were ready and willing to sail the night of the Giblin-Hanrahan fight. All of the eleven unlicensed members of the Engine Department, who were on board when the ship departed from Portland, completed the voyage.

In view of these facts, it is my conclusion that there is no rational basis upon which the Consul can be said to have been wrong in his decision. He was also in the best position to judge the situation at the critical time and with the men appearing before him to testify while their memories of the events were clearest.

The other aspect under 46 U.S.C. 682 is whether the Consul should have discharged

Appellants from the ship. None of them specifically requested this of the Consul and his decision was not directly on this issue but Appellants unanimously agreed at their meeting on 4 December that they were "in favor of getting off" and they gave the minutes of the meeting to the Master that night.

It is only logical that the Consul would have opposed the request for discharge by any of the Appellants even more strongly than the discharge of the five Deck Department seamen. Smith had been in one fight with the men and yet the Consul told the Master that he did not think there was any danger to anyone on board. But none of the Appellants had ever been in a fight with any of the five men or injured by them in any manner. So there would be much less reason to discharge them rather than one or more of the five Deck Department members. Giblin was by far the most likely prospect if anyone was discharged because it was known to the Master that Giblin had participated in a fight at the Seamen's Club the night before the Hanrahan fight. In Rogers v. Pacific-Atlantic S.S. Co. (C.C.A.9, 1948), 170 F.2d 30, it was held that the First Assistant Engineer was required to obey the order of the American Consul at Shanghai to return to the ship even though a drunken Master had threatened to shoot him.

Justification for Appellants' conduct is now limited to the issues as to whether the conduct of the five men during the voyage was such as to make it apparent that their brutality caused the ship to be unseaworthy as long as they were on board or whether Appellants had reasonable cause to believe the ship was unseaworthy on the basis of their fear of these five men. I do not think that either situation existed.

Owens and Giblin each had one fight ashore after the Consul's investigation but there is no evidence of any incidents aboard except when Giblin bothered a Chinese woman. Therefore, there were no additional incidents, as far as the shipboard conduct of these five seamen is concerned, upon which to base a finding of unseaworthiness than there had been at the time of the Consul's investigation. It follows that since a Consul may decide that a seaman should be discharged from a vessel for misconduct even though his behavior is not so objectionable as to cause the ship to be unseaworthy while such seaman is a member of the crew, the action of the Karachi Consul (in properly concluding that none of the five men should be discharged) precludes a determination that the ship was unseaworthy due to the presence of the five seamen as members of the crew. In other words, the presumption in favor of seaworthiness which is always present (Hamilton v. U.S. (C.C.A.Va., 1920), 268 Fed. 15, cert. den. 254 U.S. 645) became conclusive, under the circumstances of this particular case, as the result of the decision of the Consul and in the absence of subsequent significant acts of misconduct aboard the vessel. Even considering the two fights ashore, it cannot be said that the conduct of any or all of the five men approached the brutality of the mate in The Rolph (C.C.A. 9, 1924), 299 Fed. 52, cert. den. 266 U.S. 614.

The result of the Consular investigation also has a bearing on the reasonableness of Appellants' fear since it is not sufficient that this fear be present if there is not adequate justification for it. There was less reason to believe that their lives were in danger after the Consul had questioned many members of the crew and decided that there was little or no danger. Thus, the point is approached where it is necessary to prove unseaworthiness in order to show a reasonable

fear of the existence of unseaworthiness. Possibly, Appellants over-indulged in the feeling of fear. This seems to be so if, as some of them stated, Appellants heard Hanrahan call for help but they were afraid to look and see what was going on, much less go to his assistance against Giblin. If this is the case, then Appellants cannot be considered as men of reasonable courage and most of their fear was not justified. This is further emphasized by the apparent lack of fear on the part of the other members of the crew.

On the other hand, there is reason to doubt that Appellants were actually in fear of losing their lives. Practically all of the statements by Appellants which appear in the minutes of their meeting, held on 10 December about whether to work, indicate that they were more concerned about getting a reply to their message to the union than they were bothered about losing their lives or being seriously injured. The most significant point is that they resumed their duties under exactly the same conditions which had previously existed. Although Smith had been in a fight and had reason to fear if any of them did, he agreed to turn to on 9 December, a day before the others.

For the above reasons, I do not think that Appellants were justified in any fear, of losing their lives or suffering great physical injury, which they had. And if seamen "deliberately took the risk of their own opinion of the law, in the face of the warning of the master and the American consul," they must suffer the consequences if proven to be wrong. Hamilton v. United States, supra. My conclusion is that the findings support the specifications and the Appellants are guilty of the alleged offenses.

Appellants also contend that this offense warrants nothing more than a severe reprimand because Appellants used no threats or violence and that this is a mild case compared to the PRESIDENT WILSON (Headquarters Appeal No. 435) case in which no outright suspensions were imposed on appeal. It has previously been stated that none of the Appellants here were injured in any way. In the above PRESIDENT WILSON case, two of the Appellants had received knife cuts and a third one had been hit on the head with a bottle; and there had been no Consular decision which they refused to recognize. Furthermore, the excessive delay in the appeal of that case is not present here. The period of suspension imposed by the Examiner will be sustained.

CONCLUSION

It is not the purpose of this proceeding to determine whether union affiliations were a motivating influence in this controversy between the Deck and Stewards Departments. I simply wish to state that parties to a labor dispute may not and will not be permitted to pre-empt the authority of the Master over the crew after they have voluntarily entered into a contract of employment under the Shipping Articles for a particular voyage. This legally binding contract must be carried out so that neither justice nor commerce will be impeded. It would be "a very dangerous practice to encourage, and one which directly promotes insubordination and mutiny" to allow seamen "to exploit the necessities of their master" and render him "quite helpless" by regarding "any injury to the ship as absolving them from further service," and "to hold otherwise is to imperil his the Master's authority and the whole safety of ships and those upon them." The Condor, supra.

ORDER

The order of the Examiner dated at San Francisco, California, on 18 June, 1952, is modified to provide that the suspension imposed shall become effective not later than the time or times at which a copy of this decision is served upon each Appellant personally. In all other respects except as here modified, the order of the Examiner is AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant